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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1994

MAURICE DANCE, et al.
Petitioners,
v.
S. DAVID AVIEL
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

S. DAVID AVIEL,	)	**[Filed April 14, 1994]**
	)	
Plaintiff-Appellant,	)	CA No. 92-15619
	)	
v.	)	DC No.
	)	CV-91-01840-SAW
MAURICE DANCE;	)	
JAY TONTZ, et al.,	)	
	)	**MEMORANDUM**
Defendants-Appellees,	)	
	)	

Appeal from the United States District Court
for the Northern District of California
Stanley A. Weigel, District Judge, Presiding

Argued and Submitted October 5, 1993
San Francisco, California

BEFORE: BOOCHEVER, THOMPSON, and O'SCANNLAIN, Circuit Judges.

Professor S. David Aviel sued five administrators ("appellees") at California State University at Hayward ("CSUH") for violating his civil rights under 42 U.S.C. § 1983 and for several pendent state law claims. Aviel claims that appellees took the following actions in retaliation for a lawsuit he filed against CSUH in February 1989: (1) in Summer 1990, appellees unilaterally docked Aviel's pay $8,800 without notice; (2) in Summer 1990, appellees attempted to demote Aviel, thereby reducing his salary $16,000 annually; (3) in Summer 1990, appellees tried to discipline Aviel for a purchasing procedures irregularity involving $29, which the University later determined was petty; and (4) in February 1991, a Board of CSUH administrators denied Aviel a research grant.

The district court granted summary judgment for appellees on the section 1983 claims and dismissed the pendent state claims on Eleventh Amendment grounds. Aviel timely appealed.

I

To recover under 42 U.S.C. § 1983 for retaliation against the exercise of protected speech, a plaintiff must show that his or her speech was a "substantial" or "motivating" factor of the defendant's allegedly retaliatory

conduct. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977). Thus, to survive summary judgment, Aviel must raise a genuine issue of appellees' improper motive.

Aviel contends that he has tendered sufficient circumstantial evidence to raise a genuine issue of material fact whether the 1989 lawsuit was the motivating factor for the disciplinary actions. First, appellees in the current case were colleagues of the defendants in 1989 lawsuit and one current appellee was a witness for the 1989 defendants. Second, a former chairperson of the department testified that Aviel's 1989 lawsuit "doesn't sit well with a lot of people."

Appellees point to evidence that there was no retaliation related to the February 1989 lawsuit. First, Aviel received an earlier research grant in May of 1989, three months after he filed the lawsuit. If appellees were truly angered by appellant's lawsuit, they argue, it is more likely that they would have denied this earlier research grant, rather than the grant almost two years later. Second, appellees claim that they took disciplinary action against Aviel because of his abrupt departure for Israel in the middle of the Spring 1990 semester. Appellees assert that the students were confused and upset by the change in professors mid-semester and that Aviel did not have proper approval for his trip.

Aviel cites six cases holding that summary judgment is usually inappropriate in section 1983 cases when a plaintiff claims that he or she was punished in retaliation for protected speech and motive is at issue. In three of the cases Aviel cites, the plaintiff presented direct evidence of the defendants' improper motive. Mt. Healthy

City, 429 U.S. at 283 n. 1; Burgess v. Pierce County, 918 F.2d 104, 106, n.4 (9th Cir. 1990); Peacock v. Duval, 694 F.2d 644, 657 (9th Cir. 1982). Appellant has offered no direct evidence in this case, so these cases are inapposite.

In the three remaining cases, the plaintiff presented strong circumstantial evidence of the defendants' improper motive. For example, in Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310 (9th Cir 1989), the plaintiff "described a telephone conversation between himself and [the defendant] in which [the defendant] allegedly intimated that he would 'somehow get even' with" the plaintiff for his protected speech. Id., at 1315. In Schwartzman v. Valenzuela, 846 F.2d 1209 (9th Cir. 1988), the plaintiff produced a memorandum from the defendants "warning him that he was not authorized to speak out on certain employee matters that were then in dispute at the hospital." Id. at 1212. In Allen v. Scribner, 812 F.2d 426 (9th Cir. 1987), one defendant had "allegedly issued to [the plaintiff] a threat meant to keep the [plaintiff] from airing any of his opinions publicly." Id. at 428. Another defendant had "allegedly told [the plaintiff] to cancel a scheduled media interview and prohibited him from granting any further interviews." Id. at 429. In all three cases, there was strong circumstantial evidence that the defendants wanted to prevent or were angered by the plaintiff's speech and punished him because he did not relent.

In the case before us, there is no link between the protected speech and appellees. Aviel's strongest piece of circumstantial evidence is a statement by a former department chairperson that the 1989 lawsuit "somehow doesn't sit well with a lot of people." However, this

provides no link to these five appellees. No current appellee was a defendant in the prior lawsuit. While Aviel alleges that these appellees knew about the 1989 lawsuit, he has advanced no evidence that these five appellees even had an opinion on the issue, let alone cared enough to retaliate against appellant through disciplinary procedures. Furthermore, all of appellees' conduct took place at least a full year after the 1989 lawsuit. Aviel's specific allegations merely prove that appellees probably do not like him, but none of these allegations link appellees' conduct to the 1989 lawsuit. Furthermore, appellees have undertaken actions since the 1989 lawsuit which suggest that they bear no animus because of the lawsuit. For example, although Aviel was denied a research grant in 1991, he was awarded a similar grant in May 1989 after the lawsuit was filed.

In sum, Aviel's speculations of improper motive do not rise to the level of "strong circumstantial evidence" necessary to survive grant of summary judgment to appellees.

II

Aviel appeals the district court's dismissal of his pendent state law claims. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984), established that for Eleventh Amendment purposes state officials may not be sued in federal court for violations of state law. This bar cannot be circumvented by naming defendants in their individual capacity if "the state is the real, substantial party in interest." Id. at 101 (citations omitted). Pennhurst held that "the general criterion for determining

when a suit is in fact against the sovereign is the effect of the relief sought." Id. at 107 (emphasis in original).

Appellees argue that the state is the real party in interest under Cal. Govt. Code § 825, which provides for indemnification of damage awards against state officials for acts committed while performing official duties. The district court was persuaded that because the state would ultimately pay any resulting damages, it was the real party in interest and Eleventh Amendment immunity applied.

California's indemnification program does not expand Eleventh Amendment immunity to cover state officials sued in their individual capacities. In Ronwin v. Shapiro, 657 F.2d 1071 (9th Cir. 1981), we held that a state indemnification plan did not immunize individual state officials from state law claims in a federal court because "a state should not be able to turn a purely intramural arrangement with its officers into an extension of sovereign immunity." Id. at 1074 (quoting Laurence H. Tribe, American Constitutional Law 132-33 n.22 (1978)). Furthermore, in Demery v. Kupperman, 735 F.2d 1139 (9th Cir. 1984), cert. denied, 469 U.S 1127 (1985), this circuit specifically held that Cal. Govt. Code § 825 does not immunize officials in federal section 1983 actions. Id. at 1146-49. The district court nevertheless reasoned that Demery was inapplicable because it involved a federal claim, not a state claim as at issue here. We disagree. Although Demery involved a federal claim, the principle is the same. The logic of Ronwin and Demery survive Pennhurst. Section 825 does not establish Eleventh Amendment immunity.

We remand the state claims to the district court for further proceedings. However, because the federal

cause of action has been adjudicated, the district court has discretion to dismiss state claims for lack of jurisdiction. 28 U.S.C. § 1367(c); United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966). In making its decision, the district court should consider whether appellant would be precluded from bringing suit in state court due to application of the statute of limitations.

AFFIRMED in part, **REVERSED and REMANDED** in part; each party to bear its own costs.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

S. DAVID AVIEL,	)	**[Filed March 4, 1992]**
	)	
Plaintiff,	)	DC No.
	)	C-91-1840 SAW-ENE
vs.	)	
	)	**MEMORANDUM AND**
MAURICE DANCE,	)	**ORDER**
JAY TONTZ,	)	
WADE MOREHOUSE,	)	
BRUCE MACNAB,	)	
RICHARD ZOCK,	)	
	)	
Defendant.	)	
	)	

Plaintiff is a professor in the School of Business at California State University at Hayward ("CSUH"). Defendants are five of plaintiff's former supervisors or administrators at the University. Plaintiff sues these individuals for violation of his civil rights under 42 U.S.C.

§ 1983 and eight pendent state law claims.[1/] The suit arises from a series of disciplinary and other actions against plaintiff allegedly taken in retaliation for a state court lawsuit he filed against the University in 1989. On October 31, 1991, this Court dismissed the state law claims against defendants in their official capacities but maintained jurisdiction over the claims against them in their individual capacities. Defendants now renew their motion to dismiss the state law claims under the Eleventh Amendment. They also move for judgment on the pleadings or summary judgment on plaintiff's § 1983 claim. Plaintiff seeks an order protecting a witness from possible retaliation from the University for her testimony. He also seeks sanctions against defendants' attorney for conduct that allegedly intimidated that witness during her deposition and has now made her reluctant to testify.

Facts

In February 1989, plaintiff filed a lawsuit in state court against certain University administrators. In that suit he alleged, inter alia, that the named administrators negligently investigated unsubstantiated charges of sexual

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1. These claims are for defamation, interference with contractual relations, interference with prospective economic advantage, invasion of privacy, intentional infliction of emotional distress, and negligent infliction of emotional distress. Plaintiff dismissed initial claims for breach of contract and breach of the covenant of good faith and fair dealing. He also dismissed the State of California, which was originally named as a defendant.

harassment made against him in 1987, and defamed him by leaking those charges to the campus populace. Plaintiff also included a breach of contract claim for the University's failure to comply with its promise to destroy the file containing unsubstantiated charges of harassment made against him in 1981. The Alameda County Superior Court allegedly rendered a judgment in plaintiff's favor on June 6, 1991.[2/]

The record before the Court establishes that, since 1990, plaintiff has been the subject of a substantial amount of disciplinary action and other unfavorable treatment by the University. That action and treatment include the following:

1. In the summer of 1990, University administrators decided to demote plaintiff for taking unauthorized leave of absence in the middle of the preceding spring semester. The demotion was eventually denied by a neutral arbitrator.

2. That same summer, the University docked some $8900 of plaintiff's salary because of his spring absence. That action is now the subject of a separate contract grievance filed by plaintiff against the University.

3. Also in the summer of 1990, the University tried to discipline plaintiff for "intervening in the School's purchasing procedures" after plaintiff changed the specifications of a computer part that plaintiff himself had requisitioned for his department with University approval.

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2. No evidence of this judgment appears in the record.

After investigation and administrative review, this accusation was dropped as baseless and petty.

4. In February 1991, a Board composed of University administrators denied plaintiff a research grant. The denial was apparently based not on the merits of the proposal but on the ground that plaintiff had "violated University rules" and might misuse the funds. In April of that year, in an apparent effort to justify the denial of plaintiff's grant, the Board added criteria of "scholarly behavior" and "academic citizenship" for the awarding of grants.[3/]

Each of the named defendants was involved in at least one of the above actions. Plaintiff claims that all of the actions were taken in retaliation for his state lawsuit against the University and that defendants have therefore violated his First Amendment right of access to the courts. In the motions now before the Court, plaintiff seeks an order protecting a witness from possible retaliation from the University for her testimony. He also seeks sanctions against defendants' attorney for conduct that allegedly intimidated that witness during her deposition and has now made her reluctant to testify. Defendants move for judgment on the pleadings or summary judgment on plaintiff's § 1983, on the ground that plaintiff has presented insufficient evidence of improper motive to

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3. Plaintiff also claims that his September 1991 salary was withheld without explanation, and that the fall course he has taught for many years was assigned to new and part-time faculty. The record reveals no evidence in support of these allegations besides plaintiff's declaration.

overcome defendants' qualified immunity as state officials. Defendants also renew their motion to dismiss plaintiff's pendent state claims as barred by the Eleventh Amendment.

Discussion

A. § 1983 claim.

To survive defendants' motion for judgment on the pleadings, plaintiff's complaint must state "nonconclusory allegations setting forth evidence of unlawful intent." Branch v. Tunnell, 937 F.2d 1382, 1386 (9th Cir. 1991). The alleged evidence may be direct or circumstantial. Id. The factual allegations must be "specific and concrete enough" to enable defendants to prepare a response. Id. Plaintiff's complaint is replete with specific factual allegations of improper conduct by defendants. Although there is no allegation of direct evidence other than plaintiff's belief that defendants' actions were taken in retaliation for his lawsuit, the alleged circumstantial evidence is specific and concrete enough to deny defendants' motion to dismiss.

The evidence is not, however, sufficient to survive defendants' motion for summary judgment. Some direct evidence of unconstitutional intent is required to defeat a motion for summary judgment on qualified immunity grounds. See, e.g., Burgess v. Pierce County, 918 F.2d 104, 106 (9th Cir 1990); Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1315-16 (9th Cir. 1989). Plaintiff has presented no such evidence. Substantial evidence points to plaintiff's mid-semester absence as the primary

motivation for defendants' attempt to demote plaintiff and dock his pay. To be sure, the record suggests that at least some of the defendants may have developed a dislike or distrust of plaintiff over the years. But even if some prejudice or improper motive underlay defendants' actions, plaintiff has presented no evidence that retaliation for his lawsuit -- the sole basis of plaintiff's § 1983 claim -- was that motive.

Plaintiff points to testimony by two individuals as evidence of retaliation. First, a colleague of plaintiff stated that plaintiff is "not particularly popular" with others in the department, and that one of several reasons for his unpopularity may be his earlier lawsuit, which "somehow doesn't sit well with a lot of people." Kilgour Dep. at 76-78. Second, defendant Tontz, the deal of the business school, stated that in wanting to discipline plaintiff "to the fullest extent possible" for the unauthorized absence, he took into account plaintiff's "full record" but never investigated plaintiff's disciplinary or attendance record prior to the period of his absence. Tontz Dep. at 111-12.

None of this approaches the evidence of retaliation found sufficient to withstand summary judgment in Burgess or Sorannos' Gasco. In Burgess, a county fire marshal claimed he had been fired for speaking out against proposed ordinances he considered unsafe. The court denied summary judgment since the defendants had specifically ordered the plaintiff not to speak out further and told him his job would be jeopardized if he continued to do so. 918 F.2d at 106 n.4. In Soranno's Gasco, a petroleum products company claimed its plant permits were denied because of its vocal opposition to certain

regulations. In denying summary judgment, the court noted that one defendant had told the plaintiff he would "somehow get even" with it for generating unfavorable publicity, and the timing and nature of the allegedly retaliatory acts were suspicious. 874 F.2d at 1315-16.

Here there are no inculpatory statements by any defendant and the time and nature of the actions do not raise suspicions of retaliation. All of the actions of which plaintiff complains began during and after his spring 1990 absence, a full year after the state court lawsuit was filed. None of the defendants named herein were parties to that suit. Plaintiff's research grant proposal was denied in February 1991, but an earlier grant proposal of his was approved in May 1989, three months after his lawsuit was filed. The most that can be said is that defendants may have exploited plaintiff's absence to act on personal differences with him. No "significantly probative" evidence suggests that his lawsuit was a "substantial" or "motivating" factor in their actions. Mt Healthy City Board of Education v. Doyle, 429 U.S. 274, 287 (1976); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1985). Summary judgment for defendants is therefore appropriate. Plaintiff may well have strong claims for defamation or malicious prosecution, but these are state law torts that cannot sustain his § 1983 claim.

B. State Claims.

Defendants contend that the Eleventh Amendment bars this Court from exercising jurisdiction over plaintiff's state law claims. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 121 (1984). This Court

previously rejected this argument since nothing in the record indicted that a judgment against defendants in their individual capacities would be paid by the state. See Pennhurst, 465 U.S. at 101 n.11; Rutledge v. Arizona Board of Regents, 660 F.2d 1345, 1350 (9th Cir. 1981), aff'd. sub nom Kush v. Rutledge, 460 U.S. 719 (1982). Defendants have now shown that any judgment against them will be paid by the State of California pursuant to California Government Code § 825. A judgment against defendants would thus be a judgment against the State of California under the meaning of Pennhurst. This Court therefore cannot hear plaintiff's state law claims. The holding in Guzman v. Van Demark, 657 F.Supp. 1180, 1184 (C.D. Cal. 1987), does not change this conclusion. In retaining jurisdiction over state law claims in analogous circumstances, that case relied on Ronwin v. Shapiro, 657 F.2d 1971, 1074-7 (9th Cir. 1981), which was decided before Pennhurst, and Demery v. Kupperman, 735 F.2d 1139, 1147-49 (9th Cir. 1984), which did not involve state law claims.

C. Plaintiff's motion for protective order and sanctions.

Plaintiff seeks an order forbidding the University and any of the individual defendants from retaliating against a certain witness because of her testimony against them. That witness is an employee of the University who took notes at the Board meeting at which plaintiff's 1991 research grant was denied. During the deposition of this witness, defendants' counsel repeatedly instructed her not to answer questions about comments made during that

Board meeting by non-defendants, on the ground that these comments were privileged. See, e.g., Snyder Depo. at 45-46, 55. At one point defendants' counsel warned that he did not know "what effect [it] might have on her career" if she answered such questions. Id. at 46. The witness subsequently stated that she felt threatened and intimidated by defendants' counsel's comments. See, e.g., id. at 50-51, 68, 71. Plaintiff states that as a result of this deposition, the witness is now unwilling to testify at trial.[4/] In addition to a protective order, plaintiff seeks sanctions against defendants' counsel for his conduct during the deposition.

This Court has the power to sanction attorneys for "bad faith" or "abusive" litigation practices. See, e.g., Roadway Express, Inc. v. Piper, 447 U.S. 752, 764-66 (1980). Although the comments by defendants' counsel may have intimidated the witness, it is not clear that they were intended to do so. Defendants' counsel made efforts to explain his instructions carefully. See, e.g., Snyder Depo. at 55-57. When the witness expressed concerns, he suggested a recess and urged her to seek independent counsel. Id. at 68-69. A review of the entire transcript of the deposition does not suggest that defendants' counsel was acting in bad faith. Sanctions against him would therefore be inappropriate. A protective order is also unnecessary in light of the Court's disposition of defendants' motions.

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4. Defendants correctly object to plaintiff's statements in this regard as hearsay.

Accordingly,

IT IS HEREBY ORDERED that:

(1) Defendants' motion for summary judgment on plaintiff's § 1983 claim is GRANTED;

(2) Defendants' motion to dismiss plaintiff's state law claims is GRANTED;

(3) Plaintiff's motion for a protective order and sanctions is DENIED.

Dated: March 4, 1992.

STANLEY A. WEIGEL
Judge